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BIXBY TELEPHONE COMPANY (OKLAHOMA)
P.O. BOX 98
6 E. BRECKENRIDGE
BIXBY, OKLAHOMA 74008
918-366-8000 FAX 918-366-6610 www.bixbytelephone.com

November 26, 2003

BY HAND DELIVERY

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

96-128

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
c/o Visitronix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C 20002

Re: Bixby Telephone Company (Oklahoma)
Petition for Waiver of Default Payphone Compensation Requirements
Under Sections 64.1301(a),(d) and (e).

Please find enclosed for filing the original and 4 copies of Bixby Telephone Company's Petition for Waiver of Sections 64.1301(a), (d) and (e). We are also presenting a "Stamp and Return" copy for stamping by the FCC's representative and return to Bixby at time of hand delivery.

Sincerely,

Ed Gustafson
Comptroller/Secretary
Bixby Telephone Company

No of Copies rec'd 0+4
List ABCDE

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification and	)	CC Docket No. 96-128
Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

PETITION FOR WAIVER OF SECTIONS 64.1301(a), (d) AND (e)

Bixby Telephone Company ("Bixby"), pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") Rules[1], herby requests a waiver of Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission's Rules[2] to exclude Bixby from the requirement to pay default compensation to payphone service providers. Because Bixby is an ILEC, Bixby is included among the universal group of ILECs subject to Section 64.1301 by inclusion of "ILEC" on Appendices A, B and C of the Commission's *Fifth Reconsideration Order* in CC Docket No. 96-128[3], Bixby is currently subject to the requirement to pay default compensation to payphone providers for compensable calls. Because Bixby does not carry compensable calls, Bixby respectfully requests that the Commission waive the requirement under Sections 64 1301(a), 64 1301(d) and 64.1301(e) of the Commission's Rules for Bixby to make default payments to payphone service providers.

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1 47 C F R § 1 3

2 47 C.F R §§ 64 1301(a), 64 1301(d) and 64 1301(e)

3 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, *Fifth Order on Reconsideration and Order on Remand*, FCC 02-292 (Rel. Oct 23, 2002) (*Fifth Reconsideration Order*)

Bixby is an rural incumbent local exchange carrier (ILEC) serving approximately 10,000 customers in Oklahoma. On September 15, 2003, Bixby received a memorandum request for payment and invoice from APCC Services ("APCC"), dated August 29, 2003. Said letter indicated that APCC is rendering an invoice to Bixby for payphone compensation owed to the payphone service providers ("PSPs") pursuant to the Commission's "True-Up Order" (*Fifth Reconsideration Order*). Pursuant to the letter, unless payment of the dial-around compensation and interest was not paid by September 30, 2003, Bixby Telephone Company would be assessed additional assessments and penalties.

1. A key determination by the Commission regarding compensable calls is that an ILEC must carry a call in order to be responsible for payment.

The *Fifth Reconsideration Order* was intended to bring a "measure of finality" regarding the contentious history of payphone compensation. One purpose of the Commission's action was to ensure that payphone service providers (PSPs) receive fair compensation for every call made using their payphones. The Commission has concluded that Section 276 requires it to "ensure that per-call compensation is fair, which implies fairness to both sides."[4]

In pursuit of this objective and a fundamental criterion to the Commission's rules regarding payphone compensation was to ensure that local exchange carriers ("LECs") "pay payphone compensation <u>to the extent that they handle compensable payphone calls</u>."[5] This is a threshold criterion that must be satisfied prior to placing a burden for PSP payment on any LEC Absent satisfying this threshold criterion, a carrier would be

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4 *Fifth Reconsideration Order*, at 82

5 *Id*., at 55 (Emphasis supplied).

responsible to pay for a compensable call that it did not handle. Clearly such result would not be a fair result for the LEC.

The Commission explained how a LEC can handle compensable communications.

a. When a LEC terminates a compensable call that is both originated within its own service territory and not routed to another carrier for completion,

b. When a LEC also provides interexchange service and carries the call as would any other IXC. [6]

2. The Commission's default payphone compensation regime for ILECs is based exclusively on RBOC data that does not reflect Bixby's lack of compensable calls.

Based on at least two data requests initiated by the Commission and directed solely to the RBOCs, the Commission determined that incumbent LECs complete payphone calls that are not routed to other carriers. The RBOC data apparently shows that 2.19 percent of all compensable payphone calls are handled by the RBOCs. The Commission also noted that no other incumbent LEC objected to this data. The Commission concluded that it is appropriate to allocate to "both RBOC and non-RBOC incumbent LECs a percentage of the calls (2.19%) originating from payphones within their own service territories." Bixby did not have cause to object to this data because clearly the Commission was directing its efforts at determining the percentage for "carriers" – those entities who carry compensable communications. As will be shown below, Bixby does not carry any compensable calls. Thus the application of the allocation percentage in the case of Bixby is inappropriate.

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6 *First Report and Order*, 11 FCC Rcd at 20584 n 293.

3. Bixby is an access provider and never carries compensable calls.

A compensable call is defined by the Commission as a call from a payphone user who calls a toll-free number, dials an access code, or uses a pre-paid calling card without placing any money into the payphone.[7] Because of its operation as an access provider, Bixby does not carry any compensable communications. In early 1996, pursuant to Order No. 399040 issued by the Oklahoma Corporation Commission, the intraLATA toll pools were replaced by an Access Charge Plan. Pursuant to the Order, the rural ILECs, Bixby Telephone Company included, were ordered to become pure access providers for intraLATA toll, leaving Southwestern Bell Telephone Company the RBOC, (now Southwestern Bell Telephone, L.P d/b/a SBC Oklahoma ("SBC")), as the sole intraLATA toll provider. Bixby Telephone Company is a pure access provider for <u>all toll</u>. This includes interexchange within its own exchanges ("local toll") as well as intraLATA toll. All toll calls are either carried by SBC or an interexchange carrier. Further, pursuant to the Order, the ILECs can only provide long distance through a structurally separate affiliate. Therefore, Bixby Telephone Company clearly does not carry any compensable calls.

All compensable calls originating from payphones within the Bixby service area are passed on to other carriers who pay interstate or intrastate, as the case may be, originating access charges. Any compensable calls terminated by Bixby within its service area are received from other carriers who pay interstate or intrastate, as the case may be, terminating access charges. Thus, Bixby does not carry individual compensable calls that both originate and terminate within Bixby's LEC service area or are carried by

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7 *Fifth Reconsideration Order*, at 3

Bixby as an IXC that are subject to compensation under the criteria established in the *Fifth Reconsideration Order* for either a LEC or an IXC.[8] Any compensable call terminating in Bixby's service area would have to be an IXC-carried call. Assuming that Bixby handles compensable calls and requiring it to pay for compensable calls that it never handles is not a fair compensation mechanism.

4. The Fifth Reconsideration Order provides a mechanism for entities to be removed from the allocation percentage appendices.

Appendices A, B and C of the *Fifth Reconsideration Order* list "carrier" allocation percentages for default compensation factors for, respectively, interim access code and subscriber 800 calls (November 7, 1996 through October 6, 1997), intermediate access code and subscriber 800 calls (October 7, 1997 through April 20, 1999) and post-intermediate access code and subscriber 800 calls (April 21, 1999 forward). In the *Fifth Reconsideration Order*, the Commission noted that entities listed on Appendices A, B, or C could file a petition for a waiver with the Wireline Competition Bureau – such as the instant waiver request – for exclusion from the Commission's allocation. Note 89 states:

> ... Any entity named in our allocation that then receives a request for per payphone compensation from a PSP or other entity may, within ninety (90) days of receiving such a request, file a waiver request with the Wireline Competition Bureau for exclusion from our allocation, with a demonstration that the entity provides no communications service to others.[9]

As has been demonstrated above, while Bixby provides communications services, it never provides compensable communications service to others and is a non-carrier as defined by the *Fifth Reconsideration Order*.[10] Accordingly, Bixby requests within 90

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8 *Id*, at 55

9 *Fifth Reconsideration Order*, Note 89

10 *Id*, Note 3.

days of receipt of its only request for compensation from APCC, that it be removed from the Commission's allocation appendices.

5. Bixby's petition for waiver meets the Commission's standards for granting a waiver of its rules.

Under section 1.3 of the Commission's Rules, any provision of the rules may be waived if "good cause" is shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.[11] Payment of payphone compensation by Bixby absent compensable calls that both originate and terminate within Bixby's network, whereby Bixby does not collect any revenue for the call, apart from revenue under the applicable interstate or intrastate access charge regime, would be inconsistent with the public interest. Additionally, payment of compensation under such circumstances would undermine the policy that entities benefiting from the carrying of compensable payphone originating calls should pay compensation to payphone providers. Moreover, it would be burdensome and inequitable for Bixby and, in turn, its customers to bear the cost of default payment compensation when Bixby carries no compensable calls.[12]

CONCLUSION

For the foregoing reasons, Bixby respectfully requests that the Commission waive Sections 64.1301(a), 64.1301(d) and 64.1301(e) and thereby not include Bixby among the entities listed on Appendices A, B and C of the *Fifth Reconsideration Order* required

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11 Wait Radio v FCC, 418 F 2d 1153 (D C Cir. 1969), cert denied, 409 U S 1027 (1972) ("WAIT Radio"), Northeast Cellular Telephone Co. v. FCC, 897 F 2d 1164, 1166 (D C Cir. 1990)

12 *See* Wait Radio, 418 F.2d at 1159 The petitioner must demonstrate, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest

to pay default compensation to payphone service providers. The requested waiver will serve the public interest by allowing Bixby to avoid payment of charges for which no related benefit accrues to Bixby given that Bixby does not carry payphone originated compensable calls.

Respectfully submitted,

Bixby Telephone Company

By: Ed Gustafson

Ed Gustafson
Comptroller /Secretary
Six East Breckenridge Street
Bixby, Oklahoma 74008
918-366-8000

November 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2003, a copy of the foregoing Petition for Waiver of Sections 64.1301(a), (d) and (e) of the Commissions Rules (filed by hand delivery to the Commission c/o c/o Visitronix, Inc. on November 26,2003) was delivered by first-class, U.S. mail, postage pre-paid to the following party:

Attorneys for the American Public Communications Council ("APCC")
Albert H. Kramer
Robert F Aldrich
Dickstein, Shapiro Morin & Oshinsky, LLP
2101 L Street N.W.
Washington, D.C. 20037-1526

Scott Duncan
November 20, 2003